

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KROGER LIMITED PARTNERSHIP I,
MID-ATLANTIC

Respondent,

and

Case 5-CA-155160

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 400 (UFCW),

Charging Party.

**REPLY BRIEF OF RESPONDENT, KROGER LIMITED PARTNERSHIP I,
MID-ATLANTIC, IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Kroger Limited Partnership I, Mid-Atlantic (hereinafter, “Kroger”), by counsel, respectfully submits this Reply Brief in support of its Exceptions to the Decision of the Administrative Law Judge issued on September 9, 2016 (the "Decision"). The relevant evidence establishes that Kroger has not interfered with, restrained or coerced employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the National Labor Relations Act (hereinafter, the “Act”).

I. ARGUMENT

A. The General Counsel Fails to Establish that Protected Activity Is Implicated

Even when non-employee union agents are engaged in activity clearly protected by Section 7 (e.g., attempting to organize the employees at a facility), the existence of such protected activity does not overcome the property rights of an employer to exclude non-employees in most circumstances. See Lechmere, Inc. v. N.L.R.B., 502 U.S. 527, 533 (1992);

see also, Babcock & Wilcox, 351 U.S. 105, 112 (1956) (with the proviso that the employer may not discriminate against the union-affiliated non-employee organizers by allowing similar conduct by others). As discussed, both *infra* and in Kroger's principal brief in support of its exceptions, Kroger did not violate the Act as alleged in this case because no such discrimination occurred. That said, Kroger contends that this is a case where there was neither protected activity by the union representatives nor any form of "discrimination" that would justify disregarding the Supreme Court's mandate in Babcock & Wilcox. In particular, the ALJ erroneously determined that union agent Brandon Forester was engaged in protected activity when he accosted Kroger customers and asked them to sign a petition promising not to patronize Kroger stores. (Official transcript of March 29, 2016, hearing, pp. 57-58, hereinafter cited as "Tr. ____.")

It is undisputed that Kroger and United Food and Commercial Workers Union, Local 400 (the "Union") were parties to a collective bargaining agreement at the time Mr. Forester engaged in his "do not patronize" activity on Kroger's property. (Tr. 196; Jt. Ex. 1). Furthermore, the Union's own witness confirmed that, on the day of the attempted solicitation, the point of the exercise was to cause the Kroger customers "to not shop if [Kroger doesn't] work with the employees" regarding the Union's desire to mandate transfers to a particular Kroger Marketplace store. (Tr. 58.) Accordingly, the undisputed evidence establishes that the Union was engaged in an effort to punish Kroger for its failure to consent to a mid-contract modification of the parties' collective bargaining agreement. Such activity by non-employees is not protected by the Act. See Lechmere, 502 U.S. at 532 (noting that Section 7 "by its plain terms ... confers rights only on employees, not on unions or their nonemployee organizers").¹

¹ The Lechmere Court went on to create an exception to employer property rights that would apply "in certain limited circumstances" so that employees could learn of the advantages of self-organization from others. Id.

The ALJ found that Mr. Forester's actions were protected because he was trying to "garner support for the Union's efforts" to get Kroger to modify its contractual obligations with respect to employee transfers. While the ALJ asserts that this was "clearly protected under Section 7 of the Act," the sole authority cited by the ALJ on this issue, Glendale Associates, Ltd., 335 NLRB 27 (2001), paints a far more nuanced picture – and in fact is more supportive of the proposition that the acts at issue here are *not* protected to the degree that the ALJ found that they are so protected. (Decision 11:6-7.) As the Board explained in Glendale:

A long history of cases manifests a hierarchy among Section 7 rights, with organizational rights asserted by a particular employer's own employees being the strongest, the interests of non-employees in organizing an employer's employees being somewhat weaker, and the interests of uninvited visitors in undertaking area standards activity, or otherwise attempting to communicate with an employer's customers, being weaker still. Thus under the Section 7 hierarchy of protected activity imposed by the Supreme Court, non-employee activity in which the targeted audience was not [an employer's] employees but its customers "warrants even less protection than non-employee organizational activity."

Glendale Associates, Ltd., 335 NLRB 27, 30-31 (2001).

Moreover, the weakness of the Union' claim to protection under Section 7 must be read in the context of the U.S. Supreme Court's guidance through the years. See, Central Hardware Co. v. NLRB, 407 U.S. 539, 544-45, (1972) (noting that the principle of Babcock is "limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal"); Sears v. San Diego Cty. Dist. Council of Carpenters, 436 U.S. 180, 205 (1978) (stating that "[e]xperience with trespassory organizational solicitation by nonemployees is instructive" because, "[w]hile Babcock indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule"). The Sears Court concluded that "the burden imposed on the union is a heavy one," which "is evidenced by the fact that the balance struck by the Board and the courts under the Babcock

accommodation principle has rarely been in favor of trespassory organizational activity." Sears, 436 U.S. at 205.

Accordingly, whether one deems such non-employee actions aimed at the employer's customers to be wholly unprotected by Section 7, or simply so low in the hierarchy of Section 7 rights as to inevitably yield to the employer's property right, the relevant authorities are clear that such non-employees may be excluded from employer property. See, e.g., UFCW, Local 880 v. N.L.R.B., 74 F.3d 292 (D.C. Cir. 1996) (noting that "the precedent cited approvingly in Lechmere establishes that, *if there are any rights at all to be asserted outside the organizational context, Babcock applies*") (emphasis added). In light of the purpose at issue in the present case -- the Union's attempt to induce economic pressure to effect a mid-term modification of a binding collective bargaining agreement -- the better analysis in this case is that such activity is without any Section 7 protection.

B. The General Counsel Has Not Shown Discrimination Against Union Solicitation

As discussed at length in Kroger's principal brief, the Circuit Courts of Appeal have repeatedly rejected the Board's decisions interpreting the "discrimination" exception to be implicated by the act of permitting civic or charitable solicitation activities. See Sandusky Mall Co. v. N.L.R.B., 242 F.3d 682 (6th Cir. 2001); Be-Lo Stores v. N.L.R.B., 126 F.3d 268 (4th Cir. 1997); Cleveland Real Estate Partners v. N.L.R.B., 95 F.3d 457 (6th Cir. 1996) (noting that the Board's interpretation of discrimination under Babcock "rests on erroneous legal foundations," and finding that "[n]o relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee distribution of union literature when access to the target audience is otherwise available"). Kroger urges the Board to follow these courts and to find that:

An owner of private commercial property who permits a charitable organization to distribute information or conduct solicitations on its property simply does not implicate the policies of the NLRA and does not, without more, render an employer guilty of an unfair labor practice when later it chooses to follow the general rule of 'validly posting its property against nonemployee distribution of union literature.'

Cleveland Real Estate Partners, 95 F.3d at 465 (quoting Babcock, 351 U.S. at 112).

Because the General Counsel's brief largely echoes the Decision's justification for finding discrimination sufficient to overcome Kroger's property rights, and because the rationale for the Board to depart from its prior line of cases has been addressed in Kroger's principal brief, Kroger will not rehash all of those arguments here. Two subordinate issues, however, are deserving of mention in this Reply.

First, the General Counsel asserts that Kroger "selectively" used against the Union a letter from its landlord explaining that it was authorized to remove from the property unauthorized persons engaged in unauthorized solicitation. (G.C.'s Brief at 21.) Second, the General Counsel relies upon the Decision's finding that Kroger called the police when Mr. Forester refused to leave the property, calling this act "unprecedented" and claiming that it provides evidence of discrimination. Both contentions are without merit.

The factual record is clear that, on the day in question: (a) Mr. Forester refused leave the property or stop soliciting customers even when Kroger's store manager informed him that he must do so; and (b) the non-employee Union representatives claimed that they had a legal right to remain on the property. (Tr. 29-35, 145-46). There is not the slightest shred of evidence that any other party ever refused to leave when asked, or ever made a claim of a legal right to be on the property. Indeed, despite this clear contention in Kroger's principal brief, the General Counsel was unable to point to even a single instance when anyone other than the Union representatives at issue in this case refused to leave or claimed a right to be present.

Under the circumstances, the acts of: (a) showing the Union officials the landlord letter and; (b) calling the police when they still refused to leave, are probative of nothing more than Kroger's belief that it had an enforceable property right. There can be no "discrimination" if there is no similar conduct, and it is a simple fact no other party did what the Union did and received more favorable treatment.

Recognizing this deficiency, perhaps, the Decision makes an effort to find similar conduct by a non-union party. The Decision (and, of course, the General Counsel) point to the fact that the adherents of an area church group reportedly returned to Kroger's property on more than one day, although they never claimed any right to be there and left promptly when asked to do so by Kroger management. Apparently, as this theory would have it, Kroger had a duty, at the risk of creating evidence of discrimination, to call the police to inform them that church members had arrived in the parking lot and left when asked. That these two situations could not be more different -- particularly in the critical regard that in one case the police presence was necessary and in the other it was not -- is simply obvious.

In sum, the sheer preposterousness of these two contentions really speaks for itself, but suffice to say that the police might be surprised to learn that causing first responders to engage in an utter waste of time is a legal requirement for an employer to continue to have an enforceable property right in its premises. The reality is that Kroger had a right to exclude the union representatives from its property, and that right cannot be separated from the right to enforce its property right, or it is simply meaningless. Moreover, as a matter of basic facts, it is just not accurate to call Kroger's actions "unprecedented" and evidence of discrimination, when the Union and only the Union refused to obey the law and leave Kroger's property when asked to do so.

V. CONCLUSION

For the reasons stated above and in Kroger's principal brief, the reasons adduced at the hearing in this matter, and for such other and further reasons as may be apparent to the Board, the Kroger's Exceptions to the ALJ's Decision should be granted and Kroger should be awarded such other and further relief as the Administrative Law Judge deems appropriate.

KROGER LIMITED PARTNERSHIP I,
MID-ATLANTIC

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CERTIFICATE OF SERVICE

I, King F. Tower, being duly sworn, do hereby certify that a true and exact copy of the foregoing **“Reply Brief of Respondent in Support of Its Exceptions to the Administrative Law Judge's Decision”** was E-Filed and served by e-mail on this 4th day of November 2016, on the following:

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